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IN THE

Supreme Court of the United States

_____ Term, 1958

No. 900

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner

v.

CECIL A. THOMAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
To the Court of Civil Appeals, for the Ninth Supreme Judicial District, Beaumont, Texas

MAJOR T. BELL
CLEVE BACHMAN
Counsel for Petitioner

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---

The Kansas City Southern Railway Company, petitioner, prays that a Writ of Certiorari issue to review opinion and judgment of the Court of Civil Appeals, Ninth Supreme Judicial District, Beaumont, Texas, entered in the above entitled cause on September 9, 1957.

Citation to Opinions Below

The judgment of the Trial Court (R. 47) is unreported and is printed in Appendix A hereto, infra, p. 15. The opinion of the Court of Civil Appeals, Ninth Supreme

Judicial District, Beaumont, Texas (R. 377) is printed in Appendix B hereto, infra, p. 17, and is reported in 301 S.W. 2d 642.

Jurisdiction

The judgment of the Trial Court (R. 47) denying petitioner recovery against respondent was entered on the 27th day of November, A. D., 1956. The opinion of the Court of Civil Appeals, Ninth Supreme Judicial District, Beaumont, Texas, reversing and remanding with specific instructions to the Trial Court was handed down on the 19th day of September, 1957 (R. 377), infra, p. 17, and petitioner's motion for rehearing in the Court of Civil Appeals, Ninth Supreme Judicial District, Beaumont, Texas, was overruled the 9th day of October, A. D., 1957 (R. 383). Petitioner's application for Writ of Error to the Supreme Court of Texas (R. 399) was overruled on the 4th day of December, A. D., 1957 (R. 468), and petitioner's motion for rehearing on his application for Writ of Error in the Supreme Court was overruled on the 8th day of January, A. D., 1958 (R. 468).

This Honorable Court has jurisdiction to review the judgment or decrees heretofore mentioned, by Writ of Certiorari under the provisions of Rule 19, Subsection (a), of the *Supreme Court Rules*, and 28 *U. S. C.*, Section 1257, Subsection (3).

Question Presented

This is a Federal Employers' Liability case and the question here is whether a board that split and caused appellant to fall was a "handhold" or a "grab iron" as contemplated by the Safety Appliance Act.

Statutes Involved

The statute involved here is a specific part of the Federal Employers' Liability Act known as the Safety Appliance Act, to-wit:

> "Sec. 4. Grab irons or handholds for security in coupling and uncoupling cars.
>
> "Until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars." 45 U.S.C.A., sec. 4, Acts Mar. 2, 1893, C. 196, sec. 4, 27 Stat. 531.

Statement

Cecil Thomas, an employee of The Kansas City Southern Railway Company, sustained personal injuries when a board, which had been bolted along the top of a gondola car on which he was riding, gave way with him, causing him to fall backwards. Thomas contended that the Railway Company was negligent in failing to properly inspect the gondola car, and also claimed specific instances of failure to maintain the car in a safe condition. He also contended that the board which gave way with him was a "handhold" as contemplated by the Safety Appliance Act (R. 12). The Railway Company on the other hand contended it was not negligent and took the position that the board which gave way with Thomas was an inherent part of the construction of the railway car, was not a "handhold" or "grab iron" within the contemplation of the Safety Appliance Act. The jury found that the Rail-

way Company was not negligent in the manner of its maintaining its gondola car or in failing to inspect and in fact found that the event was the result of an unavoidable accident (R. 32-37). They also found that the board was, in effect, a handhold that could be used by the switchman in coupling and uncoupling cars, and that its insecure condition contributed, in whole or in part, to cause the respondent's injuries (R. 32-37). The question, therefore, for this court to decide is whether or not the piece of board, bolted on the top of the gondola car, which Thomas was holding onto when he fell, was a "handhold" or "grab iron" within the purview of the Safety Appliance Act. (Court of Civil Appeals Opinion, Appendix B.)

The Trial Court, having heard all the evidence, and having considered the jury's verdict, found that the plaintiff was not entitled to recover and entered a judgment that the plaintiff take nothing (R. 47).

On appeal, the Court of Civil Appeals, Ninth Supreme Judicial District, Beaumont, Texas, held as a matter of law the piece of board which gave way on the occasion in question was in fact a "handhold" or "grab iron" as contemplated by the provisions of the Safety Appliance Act and thereby reversed the judgment of the trial court, allowing the plaintiff, Cecil Thomas, to recover not on the basis of negligence, but solely on the proposition that the piece of wood was a "handhold" or "grab iron" as contemplated by the Safety Appliance Act. (Court of Civil Appeals Opinion, Appendix B, p. 17.)

The Federal Question, i.e., the applicability of the Employers' Liability Act, and specifically the portion known as the Safety Appliance Act, has been the foundation

stone of the parties' rights from the very inception of the case, having been pled by the plaintiff (R. 12) in his original petition and having been the subject of judicial construction in the judgment of the trial court (R. 47), and having been the basis of the opinion of the Court of Civil Appeals. (Court of Civil Appeals Opinion, Appendix 17.)

Reasons For Granting Writ

This writ should be granted because the State Court (Court of Civil Appeals) has by decision, erroneously, without basis of either law or fact materially changed duties, responsibilities and rights of the railway company under the Safety Appliance Act, from those contemplated by both the Statute and judicial decision. In other words, the broad effect of this decision, if allowed to stand, is to permit an inferior court, or a jury of laymen to substitute their standards as to what equipment constitutes a "safety appliance", rather than looking to the acts itself for guidance.

Section 4 of the Employers Liability Act is the provision under which the plaintiff seeks to impose liability on the defendant in this instance. Section 4 reads as follows, and we quote:

> "§ 4. GRAB IRONS OR HANDHOLDS FOR SECURITY IN COUPLING AND UNCOUPLING CARS.
>
> "Until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that

is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

Section 5 concerns the height of drawbars for freight cars and Section 6 provides certain penalties for failure to so equip. Section 7 deals with the assumption of risk by employees. Section 12 provides, and we quote:

"§ 12. SAFETY APPLIANCES AS DESIGNATED BY COMMISSION, TO BE STANDARDS OF EQUIPMENT: MODIFICATION OF STANDARDS HEIGHT OF DRAWBARS.

"The number, dimensions, location, and manner of application of the appliances provided for by sections 4 and 11 of this title as designated by the Interstate Commerce Commission *shall remain as the standards of equipment to be used on all cars* subject to the provisions of sections 11-16 of this title, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown * * *."

Section 13 provides other miscellaneous penalties, Section 14 provides liability for using a car with defective equipment; Section 15 provides for enforcement by the Interstate Commerce Commission; and Section 16 provides that the preceding provisions shall be known as the "Safety Appliance Acts."

It seems to be well established by both the Statute above cited and by case law that the duty or responsibility of the railway company for compliance with the requirements, insofar as proper equipment is concerned (i.e., handholds, grab irons, etc.) under the Safety Appliance Act is meas-

ured or fixed by the standards or requirements set by the Interstate Commerce Commission.

Referring to that portion of the Safety Appliance Act concerning ladders on railway cars (Sections 2 and 3) this court in the case *Atcheson, Topeka and Santa Fe v. Scarlett*, 57 Sup. Ct. 541, said:

> *"And the railway company having strictly complied with the regulation has discharged its full duty so far as the ladder requirement of the Safety Appliance Act is concerned. The judgment of the trial court and jury cannot be substituted for that of the commission.* See Kansas City So. Ry. Co. v. United States, 231 U.S. 423, 456, 457, 34 S. Ct. 125, 58 L. Ed. 296, 52 L.R.A. (N.S.) 1; Napier vs. Atlantic Coast Line R. Co., 272 U.S. 605, 611, 612, 47 S. Ct. 207, 209, 71 L. Ed. 432, Mahutga v. Minneapolis, St. P & S.S. M. Ry. Co. 182 Minn. 362, 366, 234, N.W. 474; Auschwitz v. Wabash Ry. Co., 346 Ill. 190, 204, 178 N.E. 403; Ford v. New York, N. H. & H. R. Co. (C.C.A.) 54 F. 2d 342, 343."

In *Illionis Central Railway Company v. Williams*, 242 U.S. 462, it was held that the requirement of the act concerning ladders (Section 3) "shall ultimately conform to a standard to be prescribed by the Interstate Commerce Commission; that is, that they shall be standardized."

In the case at bar the railway company was not remiss in its obligations as to proper safety appliances on the car but on the contrary as specifically related by the Court of Civil Appeals in its opinion in this case:

> "However, he has at no time taken the position that the board was a handhold or other safety appliance prescribed by the Interstate Commerce Commission

> under authority of 45 U.S.C.A., SEC. 12; and it is undisputed that the car from which he fell was equipped with all standardized safety appliances prescribed by the Interstate Commerce Commission for care of its class, and they were all secure." (Court of Civil Appeals Opinion, Appendix, Page 17.)

The Court of Civil Appeals in this instance has, by its own admission, gone one step beyond the Statute above quoted (Sec. 12) and cases cited, and has in effect taken the position that it can properly impose liability under the Safety Appliance Act on the railway company, even though by its own evaluation of both the testimony and the evidence in this case the railway company has completely complied with the Interstate Commerce Commission regulations in all respects as concerned "handholds" and "grab irons" on this particular piece of railway equipment.

The equipment which brought about plaintiff's injuries was a gondola car (see picture of equipment R. 304-305), owned by the defendant and used by it for the movement of sulphur. It was lined with wood on the inside, and with wooden timbers along the top rail. The wood had been placed there over the metal for fire prevention and also to keep the sulphur from getting between the steel skin of the gondola car and the wooden lining. In order to get into the car it was necessary to climb over the top rail of the gondola car which was notched at the end just over the regulation grab iron. It should be noted that the board was laid on top of the steel rail and its placement along this rail is *not shown* to have affected the ordinary use of the grab iron in any way.

On the basis of these facts and this Court's holding in the case of *Shield v. Atlantic Coast Line Ry. Co.*, 76 S. Ct. 386, the Court of Civil Appeals judiciously decrees that the board which plaintiff grabbed was a "safety appliance" within the contemplation of the Safety Appliance Act.

It is Respondent's contention that the Court of Civil Appeals has erroneously construed the meaning of the holding in the *Shields* case. A thorough examination of the entire record in this case will reveal that there is no evidence, nor suggestion that the board placed along the top of the gondola or railway car was placed or contemplated as a "safety appliance". In fact, all of the evidence is to the contrary and apparently the only reason the Court of Civil Appeals took the liberty to judicially decree it as a "safety appliance" was because of its proximity to a standardized or required "safety appliance", and second, because the men on occasions used it to hold on to. The net result of the opinion of the Court of Civil Appeals is to hold that a court has the power to adjudicate that a piece of wood or other integral part of a railway car is a "safety appliance", solely because the object (i.e., wood or other part) was located in close proximity to a required "safety appliance" and on occasions was used or appropriated by the railway workmen in lieu of the nearby prescribed safety appliance (grab iron or handhold in this instance).

If the rationale used by the court in this case at bar be accepted as a proper construction of the safety appliance act then there is unlimited liability on the part of the railway company for any part or portion of railway car or locomotive it may own, which may be used inci-

dentally to serve the same function as one of the "required safety appliances" even though the car be equipped as specifically provided for by the Interstate Commerce Commission regulations.

It seems illogical to the writer that when Congress passed the Safety Appliance Act, or this court in the *Shields* case, intended that every jury or every court in the United States that would have occasion to hear a Federal Employers Liability case would have the right, or perhaps the jurisdiction to hold that a piece of equipment or an appendage placed upon a railway car by the railway company for a purpose entirely foreign to the purpose of the Safety Appliance Act. i.e., handholds, grab irons, etc., was as a matter of law a "safety appliance".

It is the writer's impression that in the *Shields* case this court in effect held that whether a "running board" was around the dome or the perimeter of the tank car was not of controlling consequence, but that the fact that the "running board" was placed on the railway car either around the dome or on the perimeter as a "safety device" or "safety appliance" was controlling. In the case at bar the equipment which the Court of Civil Appeals has labeled a "safety appliance" was not placed on the car as a "safety device", or as an aid or a supplement to safety device already on the car, but a board was placed on the top rail of the gondola car for a purpose foreign and entirely different. It obviously was not placed there for the purpose of serving as a "safety appliance" because the prescribed Interstate Commerce Commission handhold or grab iron was located within four inches of the piece of wood and clearly served exactly the purpose for which it was put there. True enough the board, in order to serve the

purpose for which it was attached to the top rail, had to run the entire distance of the gondola car and of a necessity, would have crossed the area immediately above the prescribed grab iron where purely by reason of proximity and not by reason of purpose, it might have been used incidentally to hold on to. But no one can escape the conclusion that whether the top rail of the gondola car be steel as it was originally built, or whether it be steel covered by a piece of wood, its proximity or occasional use does not change its basic character, which is the "top rail of the gondola car" and not a "safety appliance".

The case of *Atcheson T. & S.F. Ry. Co. v. Scarlett*, 57 S. Ct. 541, certainly more nearly fits the fact situation we have here. In that case the railway car was properly equipped as required by the Interstate Commerce Commission with ladders and so on. (Our car was properly equipped). There was a brace rod placed underneath or near the ladder whose principal purpose was bracing. (There was a wood piece on the top rail of the gondola car whose principal purpose was to keep the sulphur from between the inner wood lining and the metal skin of the car and also whose purpose was fire prevention). As a result of the brace rod being at or near or in close proximity to the ladder, Scarlett sustained personal injury. (Because of the close proximity of the top rail to the grab iron plaintiff used it instead of the grab iron and was injured). In that connection this court said and we quote:

> "(6) We do not see how it reasonably can be said that the brace rod constitutes a part of the ladder. In itself, it was a contrivance separate and distinct from the ladder, designed and used for a purpose entirely apart from the use of that appliance. The

right of recovery, if any, must therefore rest upon the effect of near proximity of the ladder to the rod, neither being in itself defective. *The law to be applied to that situation is the commonlaw rule of negligence,* and not the inflexible rule of the Safety Appliance Act; *and the questions to be answered are whether the two appliances were maintained in such relation to one another as to constitute negligence on the part of the company, and,* if so, whether Scarlett assumed the risk. Ford v. New York, N. H. & H. R. Co., supra; Chicago, R. I. & P. Ry. Co. v. Benson, 352 Ill. 195, 199, 185 N.E. 244; Slater v. Chicago, St. P., M. & O. Ry. Co., 146 Minn. 390, 392, 393, 178 N.W. 813. In that view, Scarlett in abandoning his claim under the common-law rule of negligence abandoned the only possible ground of recovery.

"Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion."

The facts in this case are generally undisputed and the failure to review the decision of the Court of Civil Appeals is of far reaching consequence. As this decision stands, this court, by allowing the jury or a court to judicially decree a portion of a railroad car, a safety appliance, under the fact situation which we have here, which is obviously rather typical, this court has:

(1) For practical purposes eliminated the Interstate Commerce Commission as an agency to set the standards for standardized "safety appliances", a function which the act itself specifically delegated to the Commission.

(2) Substituted the judgment of laymen and courts as to what is a "safety appliance" under the Safety Appliance Act.

(3) In effect, it allows the use of the Safety Appliance Act as a device to eliminate the necessity of a party or claimant from proving negligence against the railway company, where any question of condition of equipment is involved, which was not the intention of the act originally except as to said specified types of equipment.

(4) Eliminates any common criterion which the railway company can rely on to determine if it has complied with the Safety Appliance Act.

(5) Creates duties and responsibilities beyond the specific contemplation or suggestion of the intentions of the Safety Appliance Act.

For these reasons, as well as those heretofore pointed out in this argument, this case is not only of considerable consequence to your petitioner but is of importance to the industry as a whole because the fact situation is of a common character and applicable to all.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

MAJOR T. BELL

CLEVE BACHMAN
Counsel for Petitioner

April 3, 1958

Attorneys for Respondent, Jacobs & Schmidt, 1602 Sterling Building, Houston 2, Texas, and Harold Peterson, McFaddin Building, Beaumont, Texas, have been furnished a copy of this brief by mailing to them at the above stated addresses.

CLEVE BACHMAN

APPENDIX A

No. D-69,623

CECIL A. THOMAS

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

In the District Court of Jefferson County, Texas
136th Judicial District

Judgment

BE IT REMEMBERED that in the above styled and numbered cause came on for hearing at a regular term of court and at a regular setting, and came the parties in person, and by and through their attorneys, and announced ready for trial, and on October 2, 1956, a jury of twelve good and lawful men and women was duly impaneled and sworn; and the jury having heard the pleadings, the evidence, argument of counsel and charge of the court, and the jury returned into the court their verdict on the 5th day of October, 1956, same being duly signed by Denys Manson, Foreman; and, thereafter, came the plaintiff by and through his attorneys and filed his motion for judgment on the verdict, and came the defendant, by and through its attorneys, and filed its motion for judgment on the verdict, or, in the alternative, motion for judgment non obstante veredicto, or, in the alternative, its motion requesting the court to set aside and disregard the answers to Special Issues Nos. 1, 2 and 3 and enter judgment for the defendant and against the plaintiff, together with notice as required by law, and the court having heard argument by both sides and considered said motions and being of the opinion that plaintiff's motion for judgment should

be refused, and defendant's motion for judgment on the verdict granted, and defendant's other motions overruled:

It is, therefore, ORDERED, ADJUDGED and DECREED by the court that the motion for judgment on the verdict, filed by the plaintiff herein, be, and the same is, in all things overruled, to which action of the court the plaintiff then and there in open court excepted.

It is further ORDERED, ADJUDGED AND DECREED that the motion for judgment on the verdict filed by the defendant herein be, and the same is, in all things granted;

It is further ORDERED, ADJUDGED and DECREED by the court that the plaintiff recover nothing of and from the defendant, The Kansas City Southern Railway Company; and,

Because of the granting of defendant's motion for judgment on the verdict, it is further ORDERED, ADJUDGED and DECREED by the court that the motion for judgment non obstante veredicto, filed by the defendant herein, and motion requesting the court to set aside and disregard the answers to Special Issues Nos. 1, 2 and 3, be, and the same are hereby, in all things overruled, to which action of the court the defendant then and there in open court excepted; and,

It is further ORDERED, ADJUDGED and DECREED by the court that the plaintiff pay all costs of court herein, for which let execution issue as may be necessary and proper.

RENDERED AND SIGNED this the 27th day of November, A. D., 1956.

HAROLD R. CLAYTON
Judge Presiding.

APPENDIX B

OPINION OF THE COURT OF CIVIL APPEALS

September 19, 1957

NO. 6127

CECIL A. THOMAS,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, APPELLEE

While working for appellee railway company as a brakeman, appellant fell from the side of a moving gondola car and was injured. This occurred about 2:50 a. m., on October 16, 1955, while both the appellant and the appellee were engaged in interstate commerce. Appellant, who will also be referred to as plaintiff, brought suit for damages, charging the defendant with both negligence and a violation of the Safety Appliance Acts, 45 U.S.C.A., secs. 1-16. A jury answered all special issues pertaining to negligence in favor of the defendant, and further found that the plaintiff fell as the result of an unavoidable accident. However, it answered all issues pertaining to the alleged violation of the Safety Appliance Acts in favor of the plaintiff, and assessed damages in the amount of $50,300.00. Both parties made motion for judgment on the verdict. The defendant also made motion, in the alternative, for judgment non obstante veredicto, and motion that such of the jury's answers as were favorable to the plaintiff be disregarded. Plaintiff's motion and defendant's alternative motions were overruled; defendant's motion for judgment on the verdict was granted; and judgment

was rendered that the plaintiff take nothing. The appeal followed.

There is but one question to be decided. It is that of whether the trial court erred in overruling the plaintiff's motion for judgment on the verdict of the jury, in granting the defendant's, and in rendering judgment accordingly.

The answer lies in whether a board that split and caused appellant to fall was something the Safety Appliance Acts required appellee to have in secure condition.

The board lay along the top of a side wall of the gondola car, at the head of a side ladder, and was fastened in place by bolts. It split and partly gave way when appellant grasped its inner edge while ascending the ladder in the discharge of his duties, and appellant was cast to the ground.

The car from which appellant fell was constructed of steel and was one of a number of similar cars used in hauling raw sulphur. To reduce the fire hazard, and apparently at the behest of sulphur shippers, the cars had been lined inside with oak planks, and a cap of oak boards or timbers had been placed atop the side and end walls. Except where they crossed the heads of ladders, the capping boards or timbers were approximately 5 x 7" in size. Where they crossed the heads of ladders, they were thinner, having apparently been only two inches or a little more in thickness. The board that gave way with appellant was a short piece of board of the lesser thickness, its length approximated the width of the ladder.

The plaintiff charged in his petition that the board was a handhold within the purview of the following provision of the Safety Appliance Acts:

"Sec. 4. Grab irons or handholds for security in coupling and uncoupling cars.

Until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars." 45 U.S.C.A., sec. 4, Acts Mar. 2, 1893, C. 196, sec. 4, 27 Stat. 531.

However, he has at no time taken the position that the board was a handhold or other safety appliance prescribed by the Interstate Commerce Commission under authority of 45 U.S.C.A., sec. 12; and it is undisputed that the car from which he fell was equipped with all standardized safety appliances prescribed by the Interstate Commerce Commission for cars of its class, and they were all secure.

The jury found that the board was "in effect a handhold that could be used by switchmen in coupling and uncoupling cars"; that it was not secure; and that its insecure condition "contributed in whole or in part to cause" appellant's injuries. It also found that the board was a "dangerous instrumentality with which to work."

The record does not expressly reflect the fact, but these findings were nonetheless disregarded by the trial court in rendering judgment. They appear, however, to have been disregarded because they were thought to be immaterial rather than because there was thought to be no evidence to support them. In other words, as we understand the record, the trial judge concluded that, as a matter of law, the board that gave way with appellant was not a grab iron or handhold within the scope of the above-quoted provision of the Safety Appliance Acts.

After much deliberation, and with no sure nor even satisfactory guide, we have arrived at the opposite conclusion. In other words, we are of the opinion that the board that gave way with appellant was, as a matter of law, something the Safety Appliance Acts required appellee to have in secure condition.

The board's position rendered it inevitable that frequently, if not invariably, it would be grasped by anyone entering or leaving the car by way of the ladder or seeking or departing a position atop the wall of the car or standing high on the ladder or passing from the ladder to its counterpart on the end of the car. And in the absence of another and better explanation, we think it must be inferred that it was in recognition of this fact and with the view of making it easier and safer for people to grasp them that thinner boards were used across the heads of ladders than elsewhere. In addition, the boards at the heads of ladders were regularly used by appellee's employees as handholds, and this practice was known to appellee. The conclusion is inescapable, therefore, that the board that gave way with appellant was both designed and intended as a handhold, and as a practical matter was a handhold, even though considerations other than the installation of a handhold accounted for its being on the car in the first instance.

We encounter no greater difficulty in concluding that the board was a handhold reasonably calculated to contribute toward "greater security to men in coupling and uncoupling cars," if this additional finding is necessary to bring it within the scope of the quoted provision of the Safety Appliance Acts.

The Safety Appliance Acts are remedial and are to be liberally construed so as to effectuate their humane purposes. See: Urie v. Thompson, 337 U.S. 163, 93 L. Ed. 1282, 69 S. Ct. 1018; Lukon v. Pennsylvania R. Co., 131 Fed. 327. But if the rule were otherwise, we think we still would not be justified in holding that men are to be considered engaged in "coupling and uncoupling cars" only while actually manipulating some part of the coupler itself and that only grab irons or handholds which are immediately accessible to persons actually manipulating the coupler are to be considered within the scope of the statute. Assuming that the coupling or uncoupling of cars is the end result sought, we are of the opinion that within contemplation of the statute one is engaged in that work while doing any incidental thing reasonably necessary to or involved in accomplishment of the ultimate purpose. Such an incidental act may consist of going to a place on the car from which to manipulate the coupler itself, of setting the hand-brake, or of any one of a variety of other things. Any grab iron or handhold with which a car is equipped and which contributes to the greater security of men while thus generally engaged in the work of coupling or uncoupling cars is, in our opinion, within the purview of the statute. The board that gave way with appellant clearly falls into this class. Furthermore, the evidence does not exclude the possibility that the board was accessible to persons in some of the positions from which the coupler could be manipulated and was actually used upon occasion by persons engaged in operating the coupler.

The purpose of the Safety Appliance Acts appears to be threefold: (1) To require that cars be equipped

with certain safety appliances. (2) To require that safety appliances be secure. (3) To impose absolute responsibility on railway companies for having cars equipped with secure safety appliances. And we think it was the intent of Congress to require that all appliances which may fairly be classified as appliances mentioned in the Acts shall be secure, irrespective of whether the Acts actually require that cars be equipped with the appliances in the first instance. This is in effect the holding in Shields v. Atlantic Coast Line R. Co., 350 U.S. 318, 100 L. Ed. 364, 76 S. Ct. 386, wherein it was said: "If a dome running board is provided by the railroad or the makers of the car and used by the railroad as an appliance necessary for the use of the car, it must be a safe board as required by section 2." Having in mind that the ultimate object of the Acts is to promote the greater security of men working on trains, it would be highly illogical to hold that the absolute responsibility of a company to keep safety appliances secure extends only to those appliances constituting the bare minimum required by the Acts and not to other similar appliances with which the car is in fact equipped and which extend the same invitation to persons to use and rely on them.

The fact that the board was not a standardized appliance specifically prescribed by the Interstate Commerce Commission does not preclude a judicial determination that it was nevertheless a safety appliance within contemplation of the Safety Appliance Acts. Shields v. Atlantic Coast Line R. Co., supra, 350 U.S. 318, 100 L. Ed. 364, 76 S. Ct. 386.

Counsel for appellee have ably briefed the case within the limits of available precedents. However, as they ap-

parently recognize, the authorities to which they have referred us are not in point on the facts and are beneficial only in a general way.

The judgment of the trial court is reversed and the cause is remanded with instructions that judgment be rendered in favor of the plaintiff. The remand is pursuant to appellee's alternative motion, in order that the defendant may file and present a motion for new trial. By proper counterpoint or cross point, appellee has attacked the jury's finding in respect to damages as being contrary to the great weight and preponderance of the evidence and represents that it desires to present this question by motion for new trial. See DeWinne v. Allen, Tex. Sup., 277 S.W. 2d 95.

JOHN R. ANDERSON,
Associate Justice